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MAR 21 1949

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 572

METROPOLIS THEATRE COMPANY,
a New York Corporation,

Petitioner,

vs.

L. H. BARKHAUSEN and RANDOLPH BOHRER,
etc., et al.,

Respondents.

**REPLY TO ANSWER TO PETITION
FOR CERTIORARI.**

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I.

Respondents' answer is in substance a very strong recognition of the importance of this case.

At page 9 of Respondents' Answer, their counsel correctly impute to us the view that Federal courts

"cannot adopt rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute."

Phrased otherwise, Respondents in effect assert that this Court *can and has intended* to adopt "rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute."

We say that this Court did not intend to state the limits of jurisdiction of District courts by its rules. We read *Sibbach v. Wilson*, 312 U. S. 1, as so holding in its declaration that the rules must

"not 'abridge, enlarge, nor modify, substantive right', in the guise of regulating procedure."

Respondents' bold assertion that this Court has intended to limit jurisdiction in diversity cases by Rule 19 is the strongest possible emphasis of the importance of this case in the field of Federal jurisdiction and procedure.

Respondents' Answer further testifies to the importance of this case at page 10:

"Any adoption of such a rule" [that is, a rule or doctrine that Federal courts must, in respondents' language at page 9, "at all times act as triers of fact under questions of state law, and cannot adopt rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute"] "would swamp the Federal Courts with business that intrinsically belongs to the state court, just such business as the instant case."

In other words, *according to respondents' own statement of the issues tendered*, this case propounds the question whether Federal courts may, under the guise of determining indispensability of parties, decline jurisdiction in diversity cases without ascertaining whether the absent parties would or would not be indispensable in a suit in the state courts.

Thus there emerges from this case a basic question in the demarcation of the concepts "substantive rights", "jurisdiction as dependent upon substantive rights", and "Federal procedure" where a suit has been dismissed for want of "allegedly indispensable parties" upon the supposition that Federal, not state, considerations of indispensability are controlling.

Respondents' depreciation as "merely procedural" of the right of a citizen of a foreign State to vindicate State rights in a Federal court starkly emphasizes the importance of the case. The federal right to prosecute State claims in a federal court is of constitutional dignity.

Petitioner says, at page 6 of its Answer:

"At best, petitioner seeks to have this Court employ *certiorari* to force the Federal courts to consider a question of state law."

This is indeed a primary object of petitioner at this juncture of this litigation.

But precisely this object was sought and obtained in *Guaranty Trust Co. v. York*, 326 U. S. 99. In that case, as in this case, the Court of Appeals held that Federal, not state, law determined the availability of the Statute of Limitations as a defense to a stockholders' suit in which the substantive rights asserted arose entirely under state law, and therefore gave no consideration to the state law.

This Court granted *certiorari*, treated the case as one of capital importance in federal jurisprudence, and, without itself undertaking an appraisal of the state law, reversed and remanded to the Court of Appeals with directions to consider the case as governed by state, and not Federal, law.

II.

The Illinois law, not considered by the Court of Appeals, would have entitled petitioner to maintain this suit without joinder of the Thompson trustees.

Mindful that it is not the office of a Reply Brief to recanvass the case, we restrict this Point to a brief but, we think, incisive and conclusive demonstration that the Illinois law of joinder of parties, which the Court of Appeals disregarded because of its view that the matter of indispensability is to be tested by Federal rather than state canons of joinder, is not at all as respondents would have the Court understand it.

None of the Illinois cases cited by respondents was an action for possession of land or for damages for their wrongful occupancy or tortious interference with contract rights where the plaintiff's interest was that of sole ownership for a separate tract of land and a portion of a building situated upon such tract and an adjoining parcel. *None* of respondents' cases involved a *specific contract*, deliberately entered into, assuring such a sole owner the right separately to recover possession of his parcel of land and damages for his wrongful occupation.

Respondents content themselves with reference to the opinion of the Court of Appeals for a statement of "the only facts necessary to determine indispensability". But the Court of Appeals did not mention, and respondents deliberately avoided notice of, the *contractual* provisions in the ground lease, on which petitioner relied below and relies here for its right separately to pursue the present litigation. Those provisions are quoted in the margin in *Petitioner's Brief in Support of Petition for Certiorari*, at pages 35 to 37, inc.

Respondents' brief has made no effort to distinguish the Illinois cases of *Stevenson v. Bachrach*, 170 Ill. 253 and *McConnel v. Kibbe*, 43 Ill. 12, both cited, discussed and relied upon in petitioner's original brief here, beyond correctly stating that they are partition suits and did not involve the question of parties. Petitioner contends that these two cases are in point and are decisive of the issue in the case at bar for the following reason: In a partition suit, the plaintiff must establish that the plaintiff and the defendant are the *joint* owners of real estate which it seeks to have partitioned, sold and the proceeds distributed. If the defendant contests the basis for the cause of action, namely *joint* ownership, and on the contrary alleges that the defendant owns its property in severalty, then the plaintiff has no case for partition. This means that in the Illinois cases cited (and perhaps in all partition cases where the defendant denies joint ownership) the court is powerless to act until it first finds that there is joint ownership.

If *Bachrach v. Stephenson* is accepted as the law of Illinois (to the effect that adjoining owners hold their land and their portion of the building thereon separately) it follows, necessarily, that the effect of this decision is also that Thompson, *et al.*, are not indispensable parties to petitioner's claim for possession and damages.

North v. Coffee, Supreme Court of Oklahoma, 191 P. (2d) 220 (1948), cited these two cases, as well as other authority, for its statement:

"In all the cases we have been able to find it has held that the fact that the building is upon both lots does not prevent separate ownership."

Petitioner cited below and relied upon the Illinois Ejectment statutes, the Illinois cases cited in its original brief, and the provisions of the contract giving rise to a sub-

stantive property right *separately* to sue respondents for possession of petitioner's separately owned real estate and for damages for its wrongful withholding. The Court of Appeals' view that the question raised was one of federal rather than State law prevented its consideration of the law of Illinois as controlling in deciding this case.

The Court of Appeals' refusal to consider the Illinois law as determining petitioner's right to bring this suit without the Thompson interests raises the important question that we ask this Court to take by granting certiorari in this case.

III.

Brief reply to sundry points.

Notwithstanding respondents' argument to the contrary, there is a sharp conflict in the *rationale* of the Courts of Appeal of the Seventh and Fifth Circuits, respectively, as to whether the matter of indispensability of parties in suits for the possession of real estate raises a question of Federal or of state law.

In both *McComb v. McCormack*, 159 F. (2) 219, and *Lawrence v. Sun Oil Co.*, 166 F. (2) 466, the Court of Appeals for the Fifth Circuit consulted State statutes as defining substantive property rights of the plaintiff and made the rights as thus defined a criterion of indispensability. In the instant case, however, the Court of Appeals cited and considered, not the Illinois Ejectment statutes or the Illinois cases relied upon by petitioner, but its declaration in *DeKorwin v. First Natl. Bank*, 156 F. (2) 858, that

"indispensability must be determined by Federal rather than local rule".

Respondents totally misconceive this Court's teachings in *Indianapolis v. Chase National Bank*, 214 U. S.

63, as declaring a doctrine that the "principal purpose of the suit and the primary controlling matter in dispute" govern the question of indispensability of parties, regardless of the state law on the subject. What this court held in that case is that where all parties are properly joined, their *alignment* will be determined by "the dominant purpose" of the suit. The Court did not hold there, nor should it approve the holding by the Court of Appeals in this case, that where jurisdiction is based upon diversity of citizenship and the Court can grant substantial relief, it should decline jurisdiction altogether because perchance it cannot grant all the relief that might be appropriate if absent parties were joined.

Neither the claim for possession nor the claim for damages requires the presence of the Thompson trustees. Even if the Thompson trustees would otherwise have been indispensable parties (which they were not,—see Brief in Support of Petition for Certiorari), the contractual provisions relied upon by petitioner and ignored by the Court of Appeals amount to an agreement that they need not be joined.

So far as the claim for damages is concerned, the Thompson trustees are not legally interested. No adjudication requiring respondents to pay petitioner moneys could possibly affect Thompson's rights or interests. If, as petitioner asserts, the occupation of the premises or any part thereof is in breach of the lease and has damaged petitioner, then the tortious occupants are liable *in personam*, whether upon the theory that (A) they are trespassers or (B) that they have tortiously assisted the lessee in breaching its contract to petitioner's financial damages. The presence of the Thompson trustees is

not required in order that this question may be litigated and adjudicated.¹

The truth is that this is a very simple case. Petitioner separately owned a parcel of land and a portion of a theatre building situated thereon. It asserted in the lower courts that under the substantive law of Illinois, it had the right to sue separately for possession of its real estate, without joinder of the trustee of the adjoining tract and the portion of the building situated thereon. It also claimed damages because the lands were occupied by persons and (made defendants) whose possession was charged to be in violation of the lease and supplemental agreements in question and who are liable for tortious participation of a breach of the covenant sued upon. Petitioner grounded its assertion upon Illinois state, Illinois Supreme Court decisions, and the provisions of its contract. The Court of Appeals has held that the matter of indispensability must be determined by Federal, not state law, (although it points to no "federal" law defining indispensability since *Erie R. R. v. Tomkins*, 304 U. S. 64), and has refused to give consideration to petitioner's claim of a substantive right separately to sue for possession and damages.

¹ Petitioner's right to collect damages for tortious interference with its contractual rights is not dependent upon forfeiture. (see Appendix to Petitioner's Brief, p. 40, last par.).

Conclusion.

Petitioner, for the reasons alleged in its Petition for Certiorari, its Brief in Support of that Petition, and this Reply Brief, asks this Court to grant its writ of certiorari in this case.

Respectfully submitted,

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